

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD ARTHUR GOLDEN,
Plaintiff-Appellee,

UNPUBLISHED
December 21, 2001

v

DENISE GOLDEN,

Defendant-Appellant.

No. 225525
St. Clair Circuit Court
LC No. 98-002050-DM

Before: Saad, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court’s judgment of divorce challenging the trial court’s findings regarding the property settlement and the amount of rehabilitative spousal support awarded. We affirm.

Defendant first argues that notwithstanding the trial court’s finding that plaintiff’s actions contributed to the breakdown of the marriage, it failed to consider this fault when determining the property distribution and, thus, he suffered no consequences for this misconduct. We disagree.

When reviewing a judgment of divorce, this Court reviews the incorporated property distribution’s findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Reversal of a trial court’s valuations of particular marital assets is only warranted where, after review of the entire record, the Court is left with a definite and firm conviction that a mistake was made. *Draggoo, supra*, 223 Mich App at 429. If the lower court’s findings of fact are upheld, then this Court must determine whether the dispositional ruling was fair and equitable under the circumstances. *Sparks, supra*, 440 Mich at 152. Dispositional rulings should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Id.*; *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999), citing *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

Absent a binding agreement, the goal in distributing marital assets in divorce proceedings is to reach an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997).¹ An equitable distribution of marital assets means that they will be roughly congruent. *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990).

When dividing marital property, the court must also consider the following factors whenever relevant:

(1) the duration of the marriage, (2) the contribution of each party to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Dart v Dart*, 460 Mich 573, 583; 597 NW2d 82 (1999), cert den 529 US 1018; 120 S Ct 1418; 146 L Ed 2d 311(2000), quoting *Sparks, supra*, 440 Mich at 159-160.]

Fault remains one of the relevant factors to be considered in a property settlement, but the trial court must not assign disproportionate weight to any one circumstance. *Sparks, supra* at 158; see also *McDougal v McDougal*, 451 Mich 80, 88; 545 NW2d 357 (1996). “Fault is an element in the search for an *equitable* division, not a punitive basis for an inequitable decision.” *McDougal, supra* at 90. Essentially, the significance and weight accorded each factor may vary according to the circumstances. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999).

On balance, the settlement here favors defendant, and given the dearth of assets and the huge marital debt, it was equitable. While plaintiff received the bulk of the marital assets, he also received a disproportionate amount of the marital debt, resulting in a negative net award of \$2,984.86. The trial court noted the contribution of an extra-marital affair to the breakdown of the marriage, but fault is only one of several factors used to determine an equitable property distribution. *Sparks, supra* at 159. Here, by its absence as a factor impacting on the final property settlement, the trial court deemed fault irrelevant to its determination. *Id.* Accordingly, we conclude that the property division was equitable under the circumstances.

Defendant’s argument that the trial court erred in awarding the Michigan National Bank outstanding debt of \$7,000 to defendant because it was offset by a decrease in plaintiff’s support arrears is without merit. Defendant allegedly withdrew the \$7,000 to offset non-receipt of support payments but, notwithstanding her altruistic motives, she is properly held responsible for its repayment because the debt was incurred by her.

¹ After remand, *Byington v Byington*, unpublished order of the Court of Appeals, entered January 8, 1999 (Docket No. 181936), lv den 461 Mich 855 (1999).

Likewise, the trial court's dispositional ruling was fair and equitable under the circumstances because very little evidence was adduced supporting the extent and amount of the arrearages. Recourse remains available to defendant through an action for contempt, MCL 552.15, or under the provisions of MCL 552.601 *et seq.* The judgment of divorce specifically stated that "any and all arrearages owed to Defendant are hereby preserved;" thus, action for the arrearages is not foreclosed.

Defendant next challenges the trial court's determination that plaintiff's City of Detroit pension was a separate asset, arguing that it was regarded by both parties as part of the family income and, thus, this *income* constitutes a marital asset that should continue to be shared equally by the parties. We disagree.

Generally, marital assets are subject to division between the parties but the parties' separate assets may not be invaded. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). Treatment of pension benefits varies, and depending on the equities of the circumstances, pensions may be distributed through either the property division or the award of alimony. *Magee v Magee*, 218 Mich App 158, 164-165; 553 NW2d 363 (1996). However, we agree with the trial court's conclusion that the underlying pension was a separate asset, having vested nine years before the parties' marriage, and that it need not be distributed because defendant failed to establish any of the statutory or equitable exceptions that would mandate invasion of this separate asset.

Defendant next challenges the trial court's award of rehabilitative spousal support, arguing that the amount awarded was insufficient. We disagree.

MCL 552.23 provides the statutory basis for spousal support outlining considerations of ability to pay, and the character and situation of the parties. MCL 552.23(1). The award of support is within the trial court's discretion, *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988), and seeks to balance the income and needs of the parties in a way that will not impoverish either party. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Periodic spousal support payments are designed to ensure the maintenance of a spouse for a period of time after the divorce. *Krist v Krist*, 246 Mich App 59, 64; 631 NW2d 53 (2001).

Our courts consider certain enumerated factors, derived from case law, when determining whether spousal support should be awarded. *Parrish v Parrish*, 138 Mich App 546, 554; 361 NW2d 366 (1984), *Ianitelli v Ianitelli*, 199 Mich App 641, 644; 502 NW2d 691 (1993); *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991). After review of the record, this Court agrees that not all the *Parrish* factors are relevant nor should they be given equal weight. The trial court's award was predicated on: (1) the parties' abilities to work; (2) the source and amount of property awarded to the parties; (3) the parties' ages; and (4) the parties' abilities to pay alimony.

The evidence established that defendant would be able to convert her current part-time employment to full-time; she received the majority of the parties' marital equity; she would be able to work longer than plaintiff before retirement; and plaintiff's pension income was already allocated to payment of child support. After review of the record and consideration of the

relative *Parrish* support factors, this Court can find no error in the trial court's decision awarding spousal support in the amount ordered.

Regarding defendant's request for attorney fees, a court may award a party any sums necessary to enable the party to carry on or defend the action, during its pendency. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997), citing MCL 552.13. The award of legal fees is allowed where necessary to enable the party to carry on or defend the suit. MCR 3.206(C)(2); *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Attorney fees may also be awarded when the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. *Hawkins, supra* at 669; *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

Under MCR 3.206(C)(2), the party requesting the fees must allege facts sufficient to show that the party is unable to bear the expense of the action, *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999), and has not contributed to the creation of any undue expense in the action. *Donahue v Donahue*, 134 Mich App 696, 701; 352 NW2d 705 (1984).

Here, at trial defendant requested attorney fees on various occasions. A specific request of \$1,500 was made by defendant for expenses incurred to prepare an answer to plaintiff's motion to enter judgment, pointing to specific errors in plaintiff's motion. Notwithstanding, an award of attorney fees was not warranted under the circumstances of this case because the record indicates that on balance, the majority of the contentious litigation was precipitated by defendant's actions toward plaintiff and he, in turn, was driven to assert his legal rights. *Mauro v Mauro*, 196 Mich App 1, 3-4; 492 NW2d 758 (1992); *Wilson v Wilson*, 179 Mich App 519, 526; 446 NW2d 496 (1989).

Moreover, apart from a cursory request, defendant's brief fails to allege facts sufficient to allow the trial court to determine whether she is unable to bear the expense. *Kosch, supra* at 354. The financial position of both parties, on balance, favors defendant because she received a net gain in assets compared to plaintiff who is required to allocate more than half his income to court-ordered payments. Defendant's settlement, combined with eventual income from full-time employment, allows this Court to conclude that there is no vastly disparate potential in the parties' earning capacities that would allow an award of attorney fees. *Wilson, supra* at 526. Likewise, regarding the appellate action, defendant's position is no more meritorious than that of plaintiff, and plaintiff is no more financially comfortable than defendant to allow a shift of attorney fees. *Nalevayko v Nalevayko*, 198 Mich App 163, 165; 497 NW2d 533 (1993); see also *Kosch, supra* at 354. Accordingly this Court cannot conclude that there was an abuse of discretion.

Defendant also argues that the trial court erred in its failure to consider dental benefits in calculating COBRA payments. This position is without merit because the record indicates that defendant only requested continuation of medical coverage and did not specifically request optical or dental benefits. Defendant's efforts to impermissibly expand the court order and secure optical and dental benefits must ultimately fail because the issue was not preserved for review. *Etefia, supra* at 472. Likewise, defendant failed to properly develop the argument on appeal. *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992). (criticized on

other grounds). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Defendant's failure to support her arguments by citation to appropriate authority or policy is fatal to her claim. *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000).

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Peter D. O'Connell